

John H.m. Chen v. U.S. General Accounting Office

Docket No. 50-200-GC-84

Date of Decision: December 23, 1985

Cite as: Chen v. GAO (12/23/85)

Before: Brown, Presiding Member

Reprisal

Termination

DECISION OF THE PRESIDING MEMBER

INTRODUCTION

On July 24, 1983, Dr. John H. M. Chen was appointed to a Training Evaluation Specialist position, GS 1701-12, Organizational Analysis and Planning Branch (OAPB), Office of Organization and Human Development (OOHD), United States General Accounting Office. His employment in this position was the direct result of a determination by the GAO Personnel Appeals Board that Dr. Chen had been discriminatorily denied employment by GAO because of his national origin, in violation of Title VII of the Civil Rights Act of 1964.

On January 20, 1984, the Petitioner, in a memorandum from Mr. Arley F. Franklin, Director, OOHD, was denied a within-grade salary increase. The stated reason for the denial of the within-grade increase as shown in the Petitioner's Exhibit 20, was the petitioner's "failure to perform satisfactorily the following critical job dimensions:"

- a. Completion of an acceptable literature search on the evaluation of learning centers.
- b. Submission of a required draft of the plan for evaluating learning centers, due January 9, 1984.
- c. Completion of an acceptable report on the evaluation of Special and Issue Area Courses.

On February 1, 1984, the petitioner filed a Complaint of Discrimination against GAO, charging harassment and unlawful retaliation because of "my successful prosecution of my civil rights claim before the GAO Personnel Appeals Board." He requested as corrective action that (1) the within-grade increase be granted; (2) that all harassment in the OOHD be ended immediately; and (3) that he be transferred to a different division or office within the GAO.

On March 20, 1984, after a period of sixty (60) days, Mr. Arley F. Franklin, in a memorandum to Dr. Chen, stated that he had reevaluated his (Dr. Chen's) performance to determine whether it had improved to an acceptable level of competence (Petitioner Exhibit 21). Mr. Franklin, as a result of the re-evaluation, concluded that Dr. Chen had "not made sufficient progress on the Learning Center Evaluation Report" and had not completed the Special and Issue Area Courses in a satisfactory manner. The within-grade increase was denied.

On May 25, 1984, Dr. Chen filed a second complaint of discrimination, alleging that on May 24, 1984, Dr. Medlin informed him that (1) the GAO Personnel Appeals Board "made an error" when it found that he had been discriminated against, and (2) that Dr. Medlin had recommended to Mr. Franklin that Dr. Chen be terminated. On June 8, 1984, in a letter from the GAO Director of Personnel to Dr. Chen, through the Director of OOHD, Dr. Chen was notified that his employment as a Training Evaluation Specialist, GS-1701-12, with the U.S. General Accounting Office would be terminated, effective June 22, 1984 (Petitioner Exhibit 16).

On June 11, 1984, Dr. Chen amended his complaint of May 25, 1984, to include his employment termination as a part of his claim of discrimination. On June 22, 1984, Dr. Chen was terminated. On December 27, 1984, after an investigation by the General Counsel of the GAO Personnel Appeals Board, Dr. Chen invoked the jurisdiction of the GAO Personnel Appeals Board--petitioning the Board to review GAO's action in his case.

The issue before the Personnel Appeals Board as stipulated in and agreed upon by both the Petitioner and the Respondent, is as follows:

Was the denial of Dr. Chen's within-grade salary increase, and the subsequent termination of the Petitioner, Dr. John H. M. Chen, a discriminatory act of reprisal resulting from his successful prosecution of a national origin discrimination case against GAO?

The Petitioner seeks the retroactive award of a within-grade increase and reinstatement to his job.

BACKGROUND

Section 704(a) of Title VII is identified in Employment Discrimination Law, by Schlei and Grossman, Chapter 15, as "the primary source of protection against retaliation for those who oppose discrimination or participate in Title VII processes." The elements of Section 704(a) which are of special significance to this case are as follows:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

The U.S. Supreme Court, in McDonnell Douglas v. Green, 441 U.S. 792 (1973), devised the presentation of proof required under the disparate treatment theory and this proof has been almost universally adopted and applied to retaliation cases. In Grant v. Bethlehem Steel Corp., 622 F.2d 43, 22 FEP 1596, at 1598 (2nd Cir. 1980), the Court noted that the "legal standards applicable to a Title VII retaliation suit are not in dispute."

[I]n order to establish such a claim, the plaintiff must show: first, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action or actions disadvantaging persons engaged in protected activities; and third, a causal connection between the first two elements, that is, a retaliatory motive playing a part in the adverse employment actions.... [T]he plaintiff must first establish a prima facie case; the burden then shifts to the employer to articulate some legitimate nondiscriminatory reason for the alleged acts of reprisal; and lastly, the burden returns to the plaintiff, who is given an opportunity to demonstrate that the employer's

reasons are a mere pretext for discrimination taken in retaliation for participation in protected activities.

There is no question or dispute that Dr. Chen participated in a protected activity when he successfully prosecuted a claim of discrimination against GAO because of his national origin. Also, there is no disputing the fact that within approximately six (6) months after he was hired, Dr. Chen's within-grade increase was denied; and within approximately eleven (11) months after the Personnel Appeals Board's order to hire him was executed by the Agency, Dr. Chen's employment was terminated during the probationary period. In Hochstadt v. Worcester Foundation, 425 F. Supp. 318, 324, 11 FEP 1426, 1431 (D. Mass), aff'd, 545 F. 2d 222, 13 FEP 804 (1st Cir. 1976), the court stated that a prima facie case of retaliation requires proof that adverse action followed protected activity "within such period of time that the court can infer retaliatory motivation." In that case, the court found that "notice of discharge within six months of the settlement" of the original case made it "reasonable to infer the discharge was causally related" to the original case. Likewise, the history and timetable of events in this case allow the Presiding Member to infer that the causal connection of the prima facie case has been established.

With the establishment of the prima facie case, the determination must be made as to whether the non-discriminatory reasons for the alleged acts of reprisal as argued by the Respondent are legitimate or pretextual. The Petitioner has stated that performance was not the issue--that the motivation for his dismissal was retaliation. The Agency, in response, has stated that the Petitioner was terminated for unsatisfactory performance, and for no other reasons (Petitioner Exhibit 16).

The issues of this complaint (in addition to the allegation of retaliation) are performance oriented; and performance factors such as project assignments, suspense dates, performance standards, performance accomplishments, and performance evaluations are examined to determine whether the facts relative to the performance of the Petitioner are such as to warrant a conclusion that it is more likely than not that Dr. Chen's poor performance rating and his subsequent termination constitute an illegal act of retaliatory discrimination.

Events Leading to Salary Increase Denial.

Dr. Chen began his employment in the Organizational Analysis and Planning Branch (OAPB) of the Office of Organization and Human Development (OOHD) on July 25, 1985. On July 26, 1985, according to Respondent Exhibit 2, he discussed specific job assignments with his supervisor, Dr. Steve Medlin. Dr. Medlin, according to Dr. Chen, indicated that he made no specific job assignments initially; each staff member developed his/her own assignments, subject to Dr. Medlin's approval. Dr. Medlin's testimony verified Dr. Chen's statement in this regard (Tr. page 17, lines 7-14). Dr. Medlin stated that each staff member is allowed to select his projects from a list of approved projects to be done. Too, Dr. Medlin stated, each staff member was required to draft his own performance standards, subject to Dr. Medlin's review and acceptance (Tr. page 18, lines 1-13).

Dr. Chen selected the evaluation of the Learning Center as one of his projects. He stated that he had thirteen (13) years experience in the evaluation of educational learning centers and that he would be happy to take that assignment (Tr. page 109, lines 16-22 and page 124, lines 8-12). Dr. Medlin described as follows Dr. Chen's role and responsibilities in the Learning Center (Tr. page 20, lines 5-8):

1. To serve as the Branch representative and point of contact with the Learning Center Resource Group, and in this capacity to attend group meetings, compute information, and participate in discussions.

2. To design the plan for evaluating the Learning Center.

Performance standards had not been developed and due dates were not established at this time. Dr. Chen was assigned the responsibility of developing the performance standards for his assignments (Respondent Exhibit 2; Tr. page 17, lines 18-22; page 18, lines 1-16). Dr. Medlin stated that Dr. Sam Holley had the assignment for a month or so that summer before Dr. Chen was appointed; but because Dr. Chen was interested in the project, and was willing to do it, Dr. Holley would be assigned another important project (Tr. page 20, line 15-22; page 22, line 1). He stated that Dr. Holley would be requested to brief Dr. Chen on the operational and organizational concepts of the Learning Center, to place in his possession all materials that had been accumulated, and to answer any questions Dr. Chen might have. Dr. Medlin stated that he gave no written assignments; all assignments were given verbally to all staff members (Respondent Exhibit 18; Tr. page 66, lines 11-22).

Dr. Chen was also assigned to write a chapter of the Training Evaluation Report for FY 1983 when the model chapter was available (Respondent Exhibit 2). The chapter assigned to Dr. Chen was entitled Special Courses and Issue Area Courses. Dr. Chen's specific assignment, as stated by Dr. Medlin (Tr. page 32, line 22; page 33, lines 1 and 2) was to write a chapter that traces these Special Issue Courses - detailing what is "good about them, bad about them, etc." The model chapter which Dr. Chen was to use for a guide was to be developed by Dr. Curtis Groves; and, according to Dr. Medlin, this model chapter was made available to Dr. Chen on or about the middle of November (Tr. page 34, lines 1-22). Dr. Chen's log (Respondent Exhibit 2) reflects this date as being November 24, 1983. These instructions were given verbally. Dr. Medlin stated that the original date proposed for Dr. Chen to submit his chapter was November 1, 1983, but because of computer and various other problems, that date was dropped. Dr. Chen was assigned the responsibility of developing the performance standards for this project.

Dr. Chen was assigned and completed several other projects that were not assessed as having been performed in an unsatisfactory manner; therefore, they will not be discussed. Two other project assignments, however, were given major status in the performance appraisal of the Petitioner. These two projects are elements of the Learning Center Evaluation Plan, the primary assignment of Dr. Chen, and are as follows:

1. To complete a Literature Search on the Evaluation of Learning Centers. On August 31, 1983, as discussed in Respondent Exhibit 2, Dr. Chen attended a meeting of the Learning Center Resources Group. At this meeting he was asked by Ann Klein, Group Chairman, to make the Learning Center Literature Search. Dr. Chen stated that he informed Miss Klein that he would be glad to do so, but she would have to clear this assignment through Dr. Medlin. On September 12, 1983, according to Dr. Chen (Respondent Exhibit 2), Dr. Medlin gave Dr. Chen the assignment as reflected in Petitioner Exhibit 5. This assignment was written and reads as follows:

"P.S. - Ann Klein asked if it was okay for you to do a literature search on the evaluation of training centers. I said it was a good idea. Would you mind doing that for your group?"

There is no indication that additional information and requirements concerning this project were given to Dr. Chen at this time--either written or verbal.

2. To "conduct research on the advantages and disadvantages of CAI." This project is first mentioned, insofar as can be determined, on the date of September 23, 1983, in Dr. Chen's log (Respondent Exhibit 2). The log states that the Petitioner conducted research on computer-assisted instruction (CAI) goals and objectives on that date. As in the other assignments, there is no indication that performance standards and due dates were established at the time the project was assigned.

On September 19, 1983, as stated in Respondent Exhibit 2, page 7, Dr. Chen submitted his final Performance Standard to Dr. Medlin. In this Exhibit, Dr. Medlin is alleged to have commented that "it was the best performance appraisal plan prepared by his staff," and he is alleged to have indicated that "most of the staff were unwilling to outline their performance appraisal plans and were unwilling to make detailed statements."

In summary, the specific major projects assigned to the Petitioner during his period of employment at the Office of Organization and Human Development were as follows:

1. Develop a plan to evaluate the Learning Center.
2. Write the chapter entitled Special Courses and Issue Area Courses for the Training Evaluation Report for 1983.
3. Perform a Literature Search on the Evaluation of Learning Centers.
4. Research the advantages and disadvantages of Computer-Assisted Instruction (CAI) and prepare a report of findings.

The major project assigned to Dr. Chen was to work with the Learning Center Resource Group and to develop a plan to evaluate the Learning Center. The literature search on the evaluation of learning centers and the report on the advantages and disadvantages of computer-assisted instruction as shown on the Performance Standard (Respondent Exhibit 19) provide information necessary to the development of a plan to evaluate the Learning Center. The only major project assigned to Dr. Chen that was not associated with the evaluation of the Learning Center was that of writing the chapter of the 1983 Training Evaluation Report entitled Special Courses and Issue Area Courses.

Prior to Dr. Chen's employment, Dr. Sam Holley was the Organizational Analysis and Planning Branch (OAPB) representative to the Learning Center Resource Group (LCRG), the entity responsible for making the Learning Center a reality. In his testimony, Dr. Medlin stated that Dr. Holley had served in this capacity for a "month or so" that summer before Dr. Chen was employed (Tr. page 20, lines 9-22). Dr. Holley, in his testimony, however, stated that he became involved in the project in 1982 and became much more involved in 1983. He stated that he assisted Mary Lynn Horst who was assigned the responsibility of keeping track of the activities of the Learning Center project (Tr. page 349-353).

In January 1983, Dr. Holley, in addressing the learning center evaluation effort, suggested to the Deputy Director of OOHd that it was not feasible to consider an actual evaluation at this point "because we didn't have a program that really had components to piece together, but that in about a year we ought to take a look at that and put something together." Further, he stated, the evaluation person (representative in the

Learning Center Resource Group) "was not there to tell them what to put in the Learning Center but to tell them how we thought would be a good way to be able to evaluate their activities" (Tr. page 352, lines 3-22). Dr. Holley was considered to be knowledgeable of and experienced in Learning Centers and their requirements.

From January to April 1983, a period of four months, Dr. Holley stated that he was engaged in developing a questionnaire designed to evaluate the responses of program participants to the materials presented to them in the Learning Center. He stated that he worked with Ms. Horst, and that was all he was doing at that time (Tr. page 353, lines 2-21).

The Learning Center project was dormant from April 1983 until August 1983 when Dr. Chen was assigned to OAPB (Tr. page 354, lines 1-3). Dr. Chen stated that on August 11, 1983, he discussed with Dr. Holley the various aspects of the Learning Center assignment; and on August 25, 1983, they met again and discussed the major problems associated with the Learning Center evaluation planning effort (Petitioner Exhibit 4).

On August 31, 1983, Dr. Chen and Dr. Holley wrote a memorandum to Dr. Medlin on the status of the Learning Center. The two primary recommendations made in this memorandum are (1) that it be emphasized that the LCRG is an "advisory" group with no responsibilities for operating the Learning Center or serving as a steering committee; and (2) that a full time professional be appointed to direct, manage, and supervise activities in the daily operation of the Learning Center (Petitioner Exhibit 4). Dr. Holley wrote the "Observation" portions of the memorandum and he and Dr. Chen developed the "Recommendations" together (Tr. page 355, lines 6-22). Ann Klein was the Chairperson of the LCRG, and in this position was responsible for developing the Learning Center objectives, which she did and which, according to Dr. Holley, were "more like goals than objectives" (Tr. page 369, lines 6-21).

Also, on August 31, 1983, at a meeting of the LCRG, Dr. Chen was designated as Dr. Holley's replacement on the LCRG. It was at this meeting that he was asked by Ann Klein to make the Learning Center Literature Search. Dr. Chen stated that Dr. Medlin never responded to the memorandum from him and Dr. Holley (Tr. page 111, lines 6-10; Petitioner Exhibit 4), but "he did call Sam and he said 'I don't have background for Learning Centers and I do not know how to answer this memo'."

On October 3, 1983, as a result of the request by Ann Klein and in compliance with the assignment by Dr. Medlin (Petitioner Exhibit 5), Dr. Chen submitted to the LCRG a document entitled Literature Search of Learning Center Materials (Respondent Exhibit 5). The submission contained a note which stated that "documentary citations related to learning centers, including (their) administration, management, operations, evaluations, guide, designs, etc." are submitted for your reference (Respondent Exhibit 5). Dr. Chen testified that he received no comments from Dr. Medlin concerning the literature search until he received the Memorandum of January 20, 1984, denying him a within-grade increase (Tr. page 121, lines 8-20). Dr. Medlin stated that comments were given on January 6, 1984 (Respondent Exhibit 18). The comment in the Memorandum from Mr. Franklin denying the within-grade increase (Petitioner Exhibit 20) stated (1) that the Petitioner had not provided summaries of articles to the Branch Managers, and (2) that he had provided only abstracts, copied from the literature search, instead of the requested summaries.

On November 24, 1983, Dr. Chen reviewed the draft model chapter of the 1983 Training Evaluation Report (Petitioner Exhibit 18) written by Dr. Curtis Groves; and on December 1, 1983, Dr. Chen discussed the model with Dr. Groves. The "model" was supposed to have been received from Dr. Groves in September 1983 (Respondent Exhibit 13), but Dr. Chen states in testimony that he did not receive it until

late October or November (Tr. page 137, lines 14-19). Dr. Medlin corroborated Dr. Chen's testimony by stating that the model was distributed in November 1983, as nearly as he could recall. Dr. Groves' performance appraisal for the period 6/8/83 to 6/8/84 does not reflect a beginning date for the submission of the draft (Respondent Exhibit #3). The standard for the submission of the draft, however, is August 15, 1983; and the final was to have been submitted on September 15, 1983 (Respondent Exhibit 3). Dr. Groves stated that he thought the model was submitted in September. The only written supportive evidence was Dr. Chen's log (Respondent Exhibit 2) which implied that November 24, 1983, was the date the draft was received.

On December 14, 1983, Dr. Chen submitted the first draft of his chapter, Special Courses and Issue Area Courses (Respondent Exhibit 10). His was one of five chapters which together would comprise the 1983 Training Evaluation Report (Tr. page 136, lines 14-18). Dr. Medlin stated that "the first objective piece of information I had that he may have been having problems was December 14 when I received the first draft of his chapter" (Tr. page 37, lines 16-20). He stated that he actually started to become concerned in November because he (Dr. Medlin) did not get a good feeling from him (Dr. Chen) that he was making progress (Tr. page 38, lines 2 and 3). Dr. Medlin stated that the first draft required what he termed almost a total rewrite (Tr. page 257, lines 1-5).

In a counseling session with Dr. Chen, which Dr. Medlin said occurred approximately the middle of December, 1983, Dr. Medlin said that he stated to Dr. Chen that he was very unhappy with his progress, that the Learning Center Evaluation Plan would be due by January 9, 1984 and that his "chapter" would be due during the first week in January 1984. There was no evidence presented that these assignment dates were given in writing to Dr. Chen. The performance standards allow two major revisions and two major rewrites for the Special Courses Chapter; the petitioner was entering upon his first major rewrite. The suspense date for the Learning Center Evaluation Plan as shown on the performance standard (Respondent Exhibit 19) is February 1984. It was changed to January 9, 1984 (Respondent Exhibit 18), Dr. Medlin stated.

On January 4, 1984, Dr. Chen submitted the second draft of his chapter, Special Courses and Issue Area Courses (Respondent Exhibit 11). At one time, Dr. Medlin referred to this second draft as a "total rewrite" (Tr. page 35, lines 10-18), and in another place, he terms it a "revision" (Tr. page 262, lines 7-9). He stated that the draft had grammatical mistakes such as mixed tenses, problems in the analysis and discussion of data, and improper stylistic choices such as beginning sentences with "Table 1" and the product just did not make sense. He could not, however, explain why the development did not make sense. (Tr. page 257, lines 1-22). Dr. Medlin stated that many of the revisions made by Dr. Chen in this second draft were iterations of his (Dr. Medlin's) comments copied verbatim.

On January 20, 1984, Dr. Chen's within-grade salary increase was due (Respondent Exhibit 18). On January 5, 1984, Dr. Medlin set up a meeting with Dr. Chen for January 6, 1984, to discuss his performance. At this meeting of January 6, 1984, Dr. Medlin testified that he informed Dr. Chen that the literature search Dr. Chen had done did not contain a summary for the Branch Managers and consisted only of abstracts (Tr. page 121, lines 8-20). Dr. Medlin's diary for January 6, 1983, however, does not indicate that the Literature Search was discussed on this date (Respondent Exhibit 18). Dr. Chen stated that he submitted the Literature Search on October 5, 1983, and had not received any comments from Dr. Medlin until the meeting of January 21 at which the denial of his within-grade was discussed, a period of approximately three months (Tr. page 121, lines 10-12). Also, Dr. Chen stated that there was no requirement for a management summary (Petitioner Exhibit 5). Also, at the January 6 meeting, Dr. Chen

stated, Dr. Medlin discussed the deficiencies of his Special Courses and Special Issue Area Courses, stating that it required two minor editorial rewrites after certain major revisions (Tr. page 137, lines 2-7). (I assume that the reference is to the performance standards, because Dr. Chen had submitted only one revision to the initial draft.)

On January 9, 1984, Dr. Chen indicated in his log (Respondent Exhibit 2) that "Steve Medlin, OAPB Manager, indicated that it (Special Courses Chapter) has been accepted with minor revisions; Ann Klein will be asked to give specific definitions of Special Courses and Issue Area Courses." After these revisions are incorporated, "I am to give the report to Yvonne Vines...for input into the MICOM word processing machine."

On January 12, 1984, Dr. Chen submitted to the Learning Center Resources Group a second Literature Search for Learning Center Evaluation. This search pertains to the evaluation process alone (Petitioner Exhibit 6). This submission did not contain a summary for managers. There is no indication or evidence, however, to the effect that the original assignment required a management summary or that the requirement was changed after Dr. Chen's explanation of his understanding of the assignment.

On January 20, 1984, (Petitioner Exhibit 20) Dr. Chen received a memorandum from Mr. Arley F. Franklin denying his within-grade (WIG) salary increase. The memorandum stated that Dr. Chen's "work is not of an acceptable level of competence." In essence, the reasons given for denying this WIG increase are (1) failure to provide to Branch managers the required summaries of relevant articles of his literature search; (2) failure to submit by January 9, 1984, the draft of the evaluation plan which Dr. Medlin stated that he requested in a counseling session in early December 1983; and (3) failure to provide an acceptable Special Courses and Issue Area Courses report to Dr. Medlin.

Events Leading to Removal Action.

In the discussion with Dr. Chen concerning the memorandum from Mr. Franklin, Dr. Medlin said that he stated to Dr. Chen that his chapter on Special Courses and Issue Area Courses would have to be completed by January 27, 1984, and the Learning Center Evaluation Plan would have to be completed by February 29, 1984. Also, Dr. Medlin stated that he informed Dr. Chen that his evaluation plan outline (Respondent Exhibit 13) would need more thought and work, and was required to be of the same specificity as that portion prepared by Dr. Holley (Respondent Exhibit 18).

During this discussion, as reflected in Respondent Exhibit 18, January 20, 1984, Dr. Chen stated that he had not understood much of what Dr. Medlin had said and asked Dr. Medlin why he did not give him his assignments in writing. Dr. Medlin responded that he did not write memos to the other staff members, he simply talked to them. He stated that maybe it would be a good idea for Dr. Chen. There is no indication, however, that he ever changed his procedures. During this discussion, also, Dr. Medlin stated to Dr. Chen (Respondent Exhibit 18) that "if he could do the work, great, but if not, he would have to be released during his probationary period." Dr. Medlin stated later (Exhibit 18) that the Personnel Office advised him to begin documenting pertinent assignments given to Dr. Chen; performance evaluations, counseling sessions, etc. Also at this meeting, Dr. Medlin stated that he gave Dr. Chen a memo that instructed him to develop the objectives and goals for the Learning Center (Respondent Exhibit 18, January 20, 1984). Dr. Chen objected, stating that developing the goals and objectives was the job of the LCRG and he was only supposed to assist them in the effort. Dr. Medlin responded by stating that Dr. Chen worked for him and the others do not, and he wanted Dr. Chen to facilitate the process of developing these elements (Respondent Exhibit 18). Dr. Chen then became responsible for two additional projects--ones that were

originally assigned to someone else but apparently had not been completed to Dr. Medlin's satisfaction (Respondent Exhibit 18).

On January 27, 1984, Dr. Chen submitted the final Evaluation Report on Special Courses and Issue Area Courses (third draft, second major revision) to Yvonne Vines (Dr. Medlin was away in training) for input into the Micom (Respondent Exhibit 12). In his diary entry of February 17, 1984, (Respondent Exhibit 18) Dr. Medlin stated that "John's chapter was close enough that I decided not to send it back for rewrite. It still had a lot of work, but it was not worth the effort." Dr. Medlin stated that he did not return the chapter to Dr. Chen for further corrections but made the changes himself. He considered the changes to be somewhere between a major rewrite and editorial comments. (That range is a very broad one, and is not specifically defined. Tr. page 37, lines 1-7). In essence, therefore, the petitioner was not allowed the four additional drafts provided by the performance standards.

On January 24, 1984, Dr. Chen prepared a draft of the Learning Center Evaluation Plan (Respondent Exhibit 14) and distributed it to the LCRG. The Plan was discussed with the group, and Mr. Arley F. Franklin was among those present; Dr. Medlin was absent.

Prior to this presentation, Dr. Chen and Dr. Medlin had engaged in the discussion of January 20, 1984. Dr. Medlin stated that the outline which he reviewed at that meeting, and which Dr. Chen said he completed in November 1983 (Respondent Exhibit 13) was the first written product he had seen regarding the Evaluation Center. He stated that the three page outline (Respondent Exhibit 13) "was generally pretty useless and doesn't really give me anything." Dr. Medlin's comments on the draft plan (Respondent Exhibit 14) states that the draft "is a good summary of what evaluations should include, but doesn't tell us what we need to do and are doing for the Learning Center." He stated that Dr. Chen needs "to lay out step-by-step plans for this particular project, not cover evaluation principles." Mr. Franklin instructed the members of the LCRG to give suggestions and criticisms concerning the Learning Center Evaluation Plan directly to Dr. Chen for incorporation into the Plan (Respondent Exhibit 2). There is no indication, as I can determine, that these recommendations and comments were given to Dr. Chen before March 1984. A discussion of February 17, 1984, (Respondent Exhibit 18) indicated that the comments still had not been given to Dr. Chen for incorporation into a final Learning Center Evaluation Plan at that date.

On February 1, 1984, Dr. Chen filed an EEO complaint charging that the denial of his within-grade constituted "unlawful retaliation" arising out of "my successful prosecution of my Civil Rights claim before the GAO Personnel Appeals Board." Additionally, he charged that Mr. Franklin's evaluation of his work was "incomplete, inaccurate, and unfair." The corrective actions sought by Dr. Chen are as follows:

1. That his within-grade increase be granted,
2. That all harassment of him in OOHD be ended immediately, and
3. That he be transferred to a different division or office within the GAO.

On February 29, 1983, Dr. Chen and Dr. Medlin met with other members of the LCRG to develop guidelines for developing the objectives of the Learning Center. As a result of the "brainstorming" at the meeting, Dr. Medlin stated that he felt that a lot of "good information" had been received. In his comments on the meeting, as shown on the hand-written page of the paper entitled "What Are the Objectives of the Learning Center" (Respondent Exhibit 15), Dr. Medlin stated to Dr. Chen that they would discuss the objectives when the feedback from the others was received. Also, he stated that he would like to see at that

time the specific measurable objectives which Dr. Chen would develop based on the discussion at the meeting.

During the hearing, Dr. Medlin stated that Dr. Chen never submitted an acceptable Learning Center Evaluation Plan. He stated that Dr. Chen's last submission was the Respondent Exhibit No. 14, of January 24, 1984 and he never made any corrections to it (Tr. page 274, lines 2-4). Additionally, he suggested that Dr. Chen obtain assistance from Dr. Minnick "who knew an awful lot about these things" (Tr. page 274). Also, Dr. Medlin gave Dr. Chen as guides some of the model evaluation plans developed by Dr. Minnick (Respondent Exhibits 16 and 17 and Tr. page 275, lines 1-22). On the other hand, Dr. Minnick testified that he has no "experience per se in the design or the management" of Learning Centers. He stated that he has read some literature around the various methodologies, but he is not involved in that aspect of training (Tr. page 85, lines 19-22; and page 86, lines 1-2). Also, Dr. Medlin stated during his testimony (cross examination) that examples given by Dr. Medlin to Dr. Chen could not be used as a model for plan content for the evaluation of an educational Learning Center. (Tr. page 312, lines 5-22; page 313, lines 1 and 2). Also, Dr. Medlin stated that he had no educational experience with learning centers (Tr. page 321, lines 17-20).

On February 29, 1984, Dr. Chen distributed to the LCRG an article entitled "Computer-Based Instruction" (Petitioner Exhibit 14). The article contained a discussion of the advantages and disadvantages of computer-based instruction. After the discussion of January 6, 1983, between Dr. Chen and Dr. Medlin on Dr. Chen's performance, Dr. Chen stated that he received permission to delay the submission of the report of research findings on the advantages and disadvantages of computer-assisted instruction (CAI). The due date for this report in the Performance Standard (Respondent Exhibit 19) is May 30, 1984, but Dr. Chen stated that Dr. Medlin had requested the report after the meeting of January 6, 1984. Dr. Chen testified that he promised to submit the report at a later date, but to submit the article as soon as possible (Tr. page 145, lines 1-18). This statement does not conflict with Dr. Medlin's statement that he did not eliminate the requirement for the CAI project.

Mr. Arley F. Franklin, the Director of OOHD, stated that he had talked with Dr. Chen on several occasions but after his memorandum of January 20, 1984, denying Dr. Chen a within-grade increase, he did not counsel him in regard to his performance. Mr. Franklin stated that as nearly as he can remember, Dr. Chen is the only employee from whom he has withheld a within-grade increase; then he stated that he could remember only one other termination.

Mr. Franklin stated that he was aware of Dr. Chen's request of February 19, 1984 to be transferred out of OOHD. The request for transfer, Mr. Franklin stated, came directly to him, and he informed Dr. Medlin that the request had been received (Tr. page 222, lines 4-8). In response to this request, Mr. Franklin advised the Director of Human Resources that he did not have the latitude under the Board order to effect that transfer since "I had been directed by a [Board] order to place Dr. Chen in a specific position." Therefore, Dr. Chen's request for transfer was denied.

Mr. Franklin stated that during his tenure, several employees have requested transfers--he did not remember how many, but knew that the figure is more than two but less than fifty. He stated that in most cases, these requests have been honored (Tr. page 221, lines 1-12; page 219, lines 19-22). He did not recall the specific reasons for all requests, but stated that some were probably for promotions.

On March 12, 1984, Dr. Medlin and Dr. Chen met to discuss the progress on the plan for evaluating the Learning Center. Dr. Medlin stated that no progress had been made; but he acknowledged that the required feedback from the LCRG staff was not provided to Dr. Chen on time (Respondent Exhibit 18). Dr. Medlin called the individuals who were supposed to supply Dr. Chen with feedback and instructed them "to get their stuff to him." The comments by Dr. Medlin state that two of the individuals furnished comments on Monday (date not given); the other stated that she would furnish comments as soon as possible. The comments were not presented as evidence.

On March 20, 1984, Dr. Chen received from Mr. Arley F. Franklin, the Director, OOHD, a memorandum concerning the re-evaluation of the denial of Dr. Chen's within-grade increase (Petitioner Exhibit 21). Mr. Franklin's statement in regard to this re-evaluation was as follows: "After carefully reviewing your performance during the past 60 days, I have concluded that your work in the two critical job elements of Projects Planned and Project Evaluation is still not at an acceptable level of competence." Also, the memorandum stated that after counseling by Dr. Medlin on ten (10) different occasions during the months of February and March 1984, Dr. Chen had not made sufficient progress on the Learning Center Evaluation Report. The memorandum also stated that the Report on Special and Issue Area Courses "required extensive additional editing by Dr. Medlin and a rewrite by you."

Dr. Chen was in an automobile accident and was off the job with injuries from March 12, 1984, until April 2, 1984. Dr. Chen's physician furnished the medical data and information required.

On April 11, 1984, Dr. Chen received from the Office of Personnel (Petitioner Exhibit 15) a memorandum notifying him of the cancellation of the personnel action of January 25, 1984, which changed his tenure group from that of a probationary employee to that of a permanent employee. The reason given for this cancellation was that an administrative error had been committed. Appointments to permanent tenure, the memorandum states, cannot be effected until a one-year trial period is completed.

On April 24, 1984, Dr. Chen submitted a draft of the Learning Center Evaluation Plan questionnaire (Petitioner Exhibit 9-A). The basic questionnaire was originally drafted by Sam Holley during the period of January-April 1983. Dr. Medlin commented that it should be updated.

On May 21, 1984, Dr. Chen submitted to the OOHD Managers and the Learning Center Resource Group Part I of the literature search report on Computer-Assisted Instructions (Respondent Exhibit 8). The documents were abstracts. The submission did not contain a separate report on the advantages and disadvantages of Computer-Assisted Instruction written by Dr. Chen, but some of the abstracts discussed these advantages and disadvantages. The performance standards require this report to be completed by May 30, 1984. Part II of the CAI literature search was submitted on June 1, 1984 (Respondent Exhibit 9); and Part III of the report was submitted on June 8, 1984 (Respondent Exhibit 7). Neither of these submissions contained a separate report on the advantages and disadvantages of CAI as required by the Standards (Respondent Exhibit 10). The submission of February 29, 1983, however, does contain a discussion of this nature.

On May 24, 1984, Dr. Medlin informed Dr. Chen that he (Dr. Medlin) "had to let him go during his probationary year." Dr. Medlin stated that Dr. Chen interpreted this statement incorrectly and it had to be explained to him several times before Dr. Chen could understand its meaning (Respondent Exhibit 18).

On May 25, 1984, Dr. Chen filed a Complaint of Discrimination, charging that during his discussion with Dr. Medlin on May 24, 1984, Dr. Medlin stated that (1) the GAO Personnel Appeals Board "made an error" when it found that he had been discriminated against and (2) that he had recommended to Mr. Franklin that he be terminated. Further, he charged harassing and retaliatory acts because of his national origin. On June 11, 1984, the complaint was amended to include his termination.

On June 5, 1984, Dr. Chen asked Dr. Medlin if he (Dr. Medlin) could arrange a transfer. Dr. Medlin told him that Ahart had already said "no" and that Dr. Medlin didn't think it was possible. (Respondent Exhibit 18).

On June 8, 1984, Dr. Chen received from Mr. Felix Brandon II, Director of Personnel, GAO, a letter notifying him that his employment as a Training Evaluation Specialist, GS-1701-12, with the U.S. General Accounting Office would be terminated during the trial period which ended on July 23, 1984 (Petitioner Exhibit 16). The effective date of the termination was June 22, 1984. The reasons cited in the letter for the termination action may be summarized as follows:

1. The Learning Center Evaluation Report, which was due on February 9, 1984, was not completed satisfactorily.
2. Communication skills, both written and oral, were deficient.
3. The chapter written for the OOHD Evaluation Report required major rewriting. Early drafts had factual errors, discrepancies between text and tables, poor analytical and logical reasoning, and incorrect grammar. In some cases, your report did not make sense. At the GS-12 level, you are expected to write reports that require minimal rewriting, have no factual mistakes, and display sound reasoning.
4. Oral communication deficiencies often make discussions with other staff members difficult, and many times leave all parties confused.

DISCUSSION

Dr. Chen stated that the Agency's allegations of poor performance during the probationary year were mere pretexts to retaliate against him for his earlier complaint with the PAB and to terminate his employment. He responded to these allegations as follows:

1. His professional publications produced prior to his employment at GAO conclusively establish his ability to evaluate, to analyze data, and to write effectively.
2. His work products comply with the instructions given him by his supervisor, Dr. Medlin.
3. He was subjected to a pattern of harassment and was the victim of discrimination and disparate treatment in that his products were reviewed far more critically by his supervisors than were the products of other staff members performing similar tasks; he was not given proper direction and assistance by his supervisor.

Each of Dr. Chen's claims are examined in turn.

1. Dr. Chen's professional publications, produced before employment at GAO conclusively establish his ability to evaluate, to analyze data, and to write effectively.

The letter of termination (Petitioner Exhibit 16) states that one of the reasons for Dr. Chen's dismissal is a deficiency in communication skills, both written and oral. The Petitioner's arguments in opposition to the Agency's allegation are based upon the professional quality and acceptability of writing and research products developed prior to his employment at the GAO. There is, however, no issue relative to the quality of Dr. Chen's oral and written skills before he became an employee of GAO. The question as to whether the quality of these products was such as to qualify Dr. Chen as a viable candidate for a position at GAO was settled by the decision of the Personnel Appeals Board which resulted in his employment by GAO. There is, therefore, no need for an additional reappraisal of these documents.

One pertinent factor, however, does need to be considered in regard to the evaluation of writing skills as they pertain to this case. All Federal employees selected from registers, even though accorded an excepted service classification (as was Dr. Chen), are required to serve a probationary period of one year after competitive appointment before they can be classified as career or career-conditional employees. The purpose of this probationary period, as stated in GAO Order 2315.1, is to allow the Agency the opportunity to observe through demonstrated performance the capacity of an individual to accomplish at a required level of competency the tasks associated with the job. In this instant case, therefore, the determinations of the Personnel Appeals Board must be related directly to current on-the-job tasks rather than to performances prior to the GAO appointment. GAO Order 2315.1 states specifically that:

"Satisfactory performance must be verified through demonstrated capacity during the trial period...."

2. Dr. Chen's work products comply with the instructions given him by his supervisors.

The determination as to whether the work products of the petitioner complied with the instructions he received must be made within the framework of two time periods; namely, the period preceding the denial of the WIG increase, and the subsequent period which culminated in his termination. As stated by both Dr. Medlin and Dr. Chen (Respondent Exhibit 18; Tr. page 66, line 11-22), Dr. Medlin gave no written assignments to any member of his staff. The assignments, with one exception, were given verbally. Therefore, the performance standards are, for the most part, the only written documents to which references can be made to determine performance requirements.

a. Learning Center Literature Search

The January 20, 1984, memorandum by Mr. Arley F. Franklin regarding the denial of the petitioner's within-grade increase (Petitioner Exhibit 20) states that the petitioner failed to conduct satisfactorily a required literature search on the evaluation of Learning Centers. Mr. Franklin's memorandum states that the petitioner was requested several times to select articles, "review them, summarize them, and provide the summaries to branch managers. You provided only abstracts from the literature search instead of the requested summaries." Petitioner's Exhibit 5 is a copy of the written assignment. A review of the exhibit clearly indicates that it does not reflect a requirement for the detail reflected in the Franklin memorandum. The written assignment in its entirety is as follows:

Ann Klein asked if it was okay for you to do a literature search on the evaluation of Learning Centers. I said it was a good idea. Would you mind doing that for your group?

The requirement is to perform a literature search on the evaluation of training centers. There is no requirement to provide summaries to Branch managers--only a literature search was required. The performance standard for this project, as reflected in Respondent Exhibit 19, requires that "literature related to LC (Learning Center) searched and completed by October 15, 1983." Dr. Chen received the written assignment from Dr. Medlin on approximately September 12, 1983. On October 3, 1983, he completed and distributed to members of the LCRG the document entitled "Literature Search for Learning Center Materials" (Respondent Exhibit 5). Dr. Chen testified that he received no comments from Dr. Medlin concerning the literature search until Dr. Medlin discussed it with him in conjunction with the denial of his within-grade increase, on January 20, 1984, approximately three months later (Tr. page 121, lines 8-20). Dr. Medlin stated in his testimony that he discussed the literature search with Dr. Chen on January 6, 1984, before the within-grade increase was denied. Dr. Medlin's diary entry of January 6, 1984 (Respondent Exhibit 18), mentions only the evaluation chapter and the Learning Center Evaluation Plan in his discussion of performance deficiencies. The literature search is not mentioned. Dr. Chen's within-grade increase was due on January 20, 1984. There was considerable testimony presented as to the meaning of the term "literature search." From a professional viewpoint, Dr. Chen and Dr. Medlin articulated different concepts as to what a literature search entails. There was, however, no evidence of a discussion of the meaning of the term between the two prior to the assessment associated with the denial of the within-grade increase. The evidence indicates that Dr. Chen followed instructions as they were written. At the January 6 meeting, Dr. Chen stated that the assignment did not require a management summary; there is no evidence that the requirement was changed after this discussion. The evidence supports Dr. Chen's statement that he completed this assignment in accordance with requirements and on a timely basis.

b. Report on the Evaluation of Special and Issue Area Courses.

The next project cited in Mr. Franklin's memorandum as having been performed unsatisfactorily and, therefore, having contributed to the denial of a WIG increase to Dr. Chen was the assignment to prepare a report on the evaluation of Special and Issue Area Courses for the 1983 Evaluation Report. The January memorandum denying Dr. Chen's salary increase, states that the report "has required two major revisions so far and may need additional rewriting. Deficiencies cited were factual errors, incorrect or improper inferences, poor written composition, and numerous grammatical errors." In the Performance Appraisal documentation (Respondent Exhibit 19), six standards are identified as being essential to the successful completion of this project. Dr. Chen generally met the standard for each of five critical elements. The sixth standard or requirement pertained to quantitative and qualitative measuring factors, and reads as follows: "Two minor editorial rewrites after the second major revision." (Underlining for emphasis.) Terms such as "minor editorial rewrite", "major revision", "complete rewrite," etc., are not defined in the standard. Therefore, the scope of each is subjective and cannot be determined or appraised. Dr. Chen's performance was evaluated as generally not having met this standard.

As reflected on the Performance Standard, the final report for this chapter was originally due on November 1, 1984, and was to have been developed in accordance with the "model" chapter written by Dr. Groves. The "model" was supposed to have been received from Dr. Groves in October 1983, but Dr. Chen stated that he did not receive the chapter until approximately November 24, 1983. Dr. Medlin corroborated Dr. Chen's statement by testifying that the model was distributed in November 1983, as nearly as he could recall (Tr. page 34, lines 8-10). On December 14, 1983, Dr. Chen submitted the first draft of his chapter entitled "Special Courses and Issue Area Courses," approximately three weeks after he had received the "model" draft (Respondent Exhibit 10). Dr. Medlin stated that he started to become concerned about Dr.

Chen's performance in November because he did not get a good feeling from him that he was making progress (Tr. page 3, lines 2 and 3). He stated further, however, that the December 14 submission was the first objective information that indicated that Dr. Chen may be having problems (Tr. page 37, lines 16-20). Dr. Medlin stated that the draft needed practically a complete rewrite. The difference, however, between a "complete rewrite" and a "major revision" was not defined. It should be remembered that the performance standard provided for two major revisions. Around the middle of December 1983, Dr. Medlin established the suspense date for the rewrite as January 4, 1984, after stating to Dr. Chen that he was very unhappy with his progress. On January 4, 1984, Dr. Chen submitted the second draft (first major revision) of his chapter to Dr. Medlin (Respondent Exhibit 11). Again, it should be remembered that, according to the performance standard, this draft could also have been subjected to "major revision" and still have been on a satisfactory course. At one point in his testimony, Dr. Medlin evaluated the second draft as requiring a "total rewrite" (Tr. page 35, lines 10-18), and at another time he evaluated it as requiring "revision" (Tr. page 262, lines 7-9). He stated that the draft had grammatical mistakes such as mixed tenses, problems in the analysis and discussion of data, and improper stylistic choices (*i.e.*, beginning sentences with designations such as "Table 1") (Tr. page 257, lines 10-22). Dr. Medlin stated that many of the revisions made by Dr. Chen in the second draft were his (Dr. Medlin's) comments copied verbatim. On January 6, 1984, Dr. Medlin established January 27, 1984, as the date for the completion of Dr. Chen's third draft. On January 27, 1984, Dr. Chen submitted the third draft (second major revision) of his chapter (Respondent Exhibit 18). According to the performance standard, two drafts to follow this one could be subject to "minor editorial rewrites" and still be satisfactory. Dr. Medlin stated that "John's chapter was close enough that I decided not to send it back for rewrite." He stated that he made the changes himself (Respondent Exhibit 18; Tr. page 36, 37).

In summary, Dr. Medlin stated that in November he became concerned about Dr. Chen's progress; and that the first draft of his chapter indicated that he may be having problems. Why Dr. Medlin expressed these fears is not clear. The evidence indicates that through January 27, Dr. Chen had performed all assignments on a timely basis. He had completed his performance standards and the individual training plan. He had assumed his role with the LCRG and was developing an outline for the plan for evaluating the Learning Center. (Dr. Chen stated that he completed this outline in November; Dr. Medlin stated that he did not see it until January 20, 1984.) The Performance Standard had a due date of February, 1984 (Respondent Exhibit 19). Dr. Chen had completed the Learning Center Literature Search on October 3, 1983, and submitted it to the LCRG. Dr. Medlin at that time had made no comments relative to deficiencies in the report. As a matter of fact, the evidence indicates that comments concerning deficiencies were not given until the denial of Dr. Chen's within-grade increase was being discussed. The allegations of deficiencies concerning the omission of management summaries were not supported by the written assignment to which they pertained. Dr. Medlin stipulated in his testimony that the first two drafts of Dr. Chen's Special Courses and Issue Area Courses were poorly written and required major rewrites and revisions. The standard for measuring the acceptability of this product, however, allows the developer two major revisions and two editorial rewrites--an indication that major revisions, for one reason or another, were expected. The standards do not define the meaning of the terms "major revision," "editorial rewrites," and "major rewrites." The third draft of Dr. Chen's chapter was accepted by Dr. Medlin as being close enough not to be sent back; an indication that the project generally met requirements. The suspense dates for projects were set as the projects moved from one stage of completion to another. Dr. Chen met all suspense dates. In actuality, Dr. Chen required only two re-drafts for his chapter to be accepted when four ("two minor editorial rewrites after the second major revision") were allowed by the standards. The fact that Dr. Chen was not asked to do the two minor editorial rewrites was the choice of Dr. Medlin. The evidence indicates that up to the time when the within-grade increase was due, Dr. Chen had generally met

the performance standards--at least at the generally acceptable level. The Learning Center Evaluation Planning report, according to the performance standard (Respondent Exhibit 19), was not due until February 1984, and all other requirements as reflected on the standards had been met.

c. Plan for Evaluating the Learning Center.

The next project cited in Mr. Franklin's memorandum as having been performed unsatisfactorily and, therefore, having contributed to the denial of a within-grade increase to Dr. Chen was the assignment to develop a Plan for Evaluating the Learning Center. In assessing the validity of the Petitioner's statement that he completed the assignment as required, a determination must be made as to the nature of the assignment. There is no questioning Dr. Medlin's statement that the petitioner was required to develop a plan for the evaluation of the Learning Center. The meaning of the term "plan", however, is in question. The performance standards for this assignment state that the report must be "technically sound, feasible, and meet LC input needs." These criteria are very subjective and measuring performance against them is very difficult. Additionally, the standard allows one major rewrite and two editorial rewrites.

During the second week of December 1983 as recorded in Dr. Medlin's diary on January 21, 1984 (Respondent Exhibit 18), Dr. Medlin discussed the Learning Center evaluation plan with Dr. Chen and told him that he "was unhappy with his progress." Dr. Medlin stated that he and Dr. Chen agreed that Dr. Chen would submit a draft on January 9, 1984. Dr. Medlin stated that Dr. Chen seemed to be unsure of how to do it, "so I (Dr. Medlin) told him not to make such a big deal out of it, just sit down and write out what should be looked at in a Learning Center." This is the first guideline for this assignment of any specificity, as nearly as can be ascertained, that was given by Dr. Medlin to Dr. Chen. The January 9, 1984, suspense date actually shortened Dr. Chen's development time by three weeks to a month or more when compared with the first submission date of February 1984 listed on the Performance Standard. Dr. Chen did not meet the January 9, 1984, suspense date; he did, however, submit a draft report of the plan on January 24, 1984 (Respondent Exhibit 14)--which would have satisfied the requirements of the February date listed in the performance standards. In assessing this draft, Dr. Medlin stated on the report that the draft is "a good summary of what evaluations should include, but doesn't tell us what we need to do and are doing for the Learning Center." The requirement "to tell us what we need to do and are doing for the Learning Center" implies a requirement of high specificity for a Learning Center that was not in operation and for which, at that time, the objectives had not been defined. The performance standards do not address requirements to this degree of specificity; nor is this specificity apparent in the guidelines and statements of Dr. Medlin "to just sit down and write out what should be looked at in a Learning Center." The reference here is general in nature.

The shift from general instructions to substantially more specific criticism at a later date appeared in another context in this assignment. In his testimony concerning the role Dr. Chen was to play in the Learning Center project, Dr. Medlin stated that Dr. Chen was to serve as the Branch contact with the LCRG--attending meetings, computing information (I suppose this expression means to put information into the computer, but the meaning was not defined), participate in meetings, and design the plan for evaluating the Learning Center (Tr. page 20, lines 1-8). Because Dr. Medlin generally did not put assignments in writing, the specificity and the nature of his instructions to Dr. Chen cannot be determined from this statement. It appears that the first indication of any guidelines in regards to the contents of the Learning Center Plan is in the comments of Dr. Holley made in January 1983 (Tr. page 352, lines 3-22). On this date, Dr. Holley (who, at that time, was the Branch's most knowledgeable employee on Learning Centers), in addressing the Learning Center evaluation effort, suggested to the Deputy Director that "it was

not feasible to consider an actual evaluation at this point because we didn't have a program that really had components to piece together, but that in a year, we ought to take a look at that and put something together." The implication of this statement is that developing plans for an actual evaluation was not feasible in January 1983, and would not be feasible until the nature of the components of the Learning Center was known. There was no evidence in the hearing that the nature of the components of the Learning Center had been established during 1983. Just what to evaluate specifically, therefore, was not known. This information concerning components, together with all other available information on Learning Centers, was given to Dr. Chen by Dr. Holley at the request of Dr. Medlin (Tr. page 354, lines 5-16). On January 20, 1984, Dr. Chen, who had thirteen years of experience in educational learning centers, made a very similar statement concerning the absence of components to Dr. Medlin. Specifically, Dr. Chen stated that he could not develop a specific plan for evaluating a Learning Center when the Learning Center was not in place (Respondent Exhibit 18). Dr. Medlin stated that the draft plan submitted by Dr. Chen on February 24, 1984, was a "good summary of what evaluations should include." This statement implies that Dr. Chen did what he was told to do; namely to sit down and write out what should be looked at in a Learning Center. The guidelines are stated in a general manner, and the response from Dr. Chen satisfies the requirements.

During his testimony, Dr. Medlin stated that he had no education in Learning Centers (Tr. page 321, lines 17-21). He suggested that Dr. Chen obtain assistance from Dr. Minnick, who Dr. Medlin stated, "knew an awful lot about these things" (Tr. page 274, lines 7-11). Dr. Medlin testified that he gave to Dr. Chen as models some of the plans that Dr. Minnick had developed and which were examples "of what we expected from him" (Tr. page 275, lines 1-22). However, Dr. Minnick testified that he had "no experience per se in the design nor the management of Learning Centers;" that he had read some literature concerning the methodologies, but that he had not been involved in that aspect of training (Tr. page 85-86). Dr. Medlin testified under cross-examination that the models given to Dr. Chen by Dr. Medlin were not suitable for content guidelines for the development of a Learning Center evaluation plan (Tr. page 312, line 22; page 313, lines 1-2). It appears, therefore, according to Dr. Medlin's own testimony, that the assistance and guidelines furnished to Dr. Chen relative to the development of a Learning Center were inadequate and inappropriate and were not suitable for content guidelines for the development of a Learning Center evaluation plan.

Due to the lack of specificity, definitiveness and proper guidelines in the instructions and the performance standards given to Dr. Chen, it is difficult to determine the exact nature of requirements and the extent to which they were met. From the circumstantial evidence presented, however, it can be inferred that Dr. Chen submitted a plan for evaluating the Learning Center that at least satisfied to a reasonable degree the requirements specified in the Performance Standards and in Dr. Medlin's instructions. Dr. Chen indicated to Dr. Medlin that he did not understand what was expected of him and requested that Dr. Medlin give him his assignment in writing. Dr. Medlin refused to do so, stating that he gave no written assignments to any of his staff. (Tr. page 285, lines 10-22). He added during a discussion of January 20, 1984, that unless Dr. Chen's performance improved, he would be terminated during the probationary period (Respondent Exhibit 18). For this assignment, the guidance furnished Dr. Chen, as reflected in the testimonies of Dr. Holley, Dr. Minnick, Dr. Medlin, and Dr. Chen was inadequate and did not provide the pertinent information and guidelines necessary for him to determine specifically the requirements of the task and the acceptable level of competence. Additionally, the statement concerning termination during the probationary period could be conceived as a threat, especially in light of the lack of evidence of unacceptable performance at that point in time. I am persuaded that considering these instructional deficiencies, Dr. Chen satisfied the standard to the degree possible.

d. Report on Computer-Assisted Instructions.

The final project assigned to Dr. Chen was the requirement to prepare a report of research findings on the advantages and disadvantages of Computer-Assisted Instruction. There was some discussion between Dr. Chen and Dr. Medlin concerning this assignment. However, before it became due, Dr. Medlin stated that he had decided to terminate Dr. Chen. The report was due on May 30, 1984. Dr. Medlin stated that by mid-May, approximately the 15th, he had made up his mind to terminate Dr. Chen (Tr. page 51, lines 15-22; page 52, lines 1-9). Neither the memorandum denying Dr. Chen a within-grade increase (Petitioner Exhibit 20), nor the letter of termination (Petitioner Exhibit 16) cite unsatisfactory performance of this assignment as a reason for the termination of Dr. Chen or the denial of the within-grade increase. For that reason it is not discussed in detail. Dr. Chen, however, did submit documents that partially satisfied the requirement (Respondent Exhibit 7, 8, 9; Petitioner Exhibit 14).

Having concluded that Dr. Chen performed satisfactorily under the circumstances on all three of the assignments that ultimately provided the basis for his salary-increase denial and his termination from employment, we now turn to consideration of Dr. Chen's third and final allegation.

3. Dr. Chen was subjected to a pattern of harassment and was the victim of discriminatory and disparate treatment; his products were reviewed far more critically by his supervisor than were the products of other staff members performing similar tasks; he was not given proper direction and assistance by his supervisors.

In Teamsters v. United States, 431 U.S. 324, at n. 15, 14 FEP 1514 (1977), the Supreme Court defined a claim of disparate treatment as follows:

The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.

In the case McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973), the Supreme Court stated that what was at issue in the disparate treatment case is whether the plaintiff was subjected to different treatment because of the plaintiff's protected activity. Dr. Chen, in his Complaint of Discrimination, stated that he was subjected to disparate treatment because he had successfully prosecuted before the GAO Personnel Appeals Board a complaint of discrimination based on national origin. He alleged that the termination of his employment by GAO is an act of retaliation resulting directly from his having participated in this protected action. Dr. Chen cites several instances to support his claims. I find, as detailed below, that the evidence supports all but one of his allegations.

a. Comparison of Treatment of Petitioner and Dr. Holley.

Dr. Sam Holley was the OAPB representative to the LCRG prior to Dr. Chen's employment. Dr. Medlin testified that Dr. Holley had the assignment of working on the Learning Center project only a couple of months before Dr. Chen was hired. Dr. Holley, however, stated that he became involved in the Learning Center project in 1982, and became much more involved in 1983. He testified that from January to April 1983, a period of four months, he was engaged in developing a questionnaire designed to evaluate the response of program participants to the materials presented to them in the Learning Center (Tr. page 353, lines 2-14). Dr. Holley was considered to be knowledgeable of and experienced in Learning Centers and their requirements (Tr. page 360, lines 5-22; page 361, lines 1- 21). He stated that this project was all he was doing for this four-month period. Dr. Holley, at that time, was a GS-13/3 Personnel Psychologist. His

Performance Appraisal dated June 7, 1983, (Respondent Exhibit 5) shows that one of the special projects assigned to him to complete was a Learning Center Evaluation Plan. The Appraisal Form (Respondent Exhibit 5) does not reflect standards of any nature, and shows no time frames or suspense dates for completion. The "rater narrative" for Dr. Holley states that the "Learning Center and MP evaluation plans are complete," and the standards were "generally met."

In August 1983, however, (only two months later) Dr. Chen was assigned to develop a Learning Center Evaluation Plan, which infers that the plan developed by Dr. Holley a short time earlier was unsatisfactory or incomplete in some respects or it would not have been necessary for Dr. Chen to be assigned the same project a few months later. The Performance Appraisal reflects that Dr. Holley was not given any deadlines, and worked for four months developing one element of the Learning Center Plan--a questionnaire. By contrast, Dr. Chen was given suspense dates to meet (which were compressed as the project developed) as well as other projects to develop at the same time. In the course of his assignments, Dr. Chen was given the task of developing a Learning Center Evaluation Plan and rewriting the questionnaire developed by Dr. Holley. After a period of approximately six (6) months, Dr. Chen was denied a within-grade increase and was eventually terminated, being charged with not completing three projects in a timely and acceptable manner. Dr. Holley, by contrast, testified that he had worked on the Learning Center Questionnaire for four months. The development of the Learning Center Evaluation Plan, which is stated to have been completed by him in 1983, was not completed because it was assigned to Dr. Chen for complete development. Dr. Holley's Appraisal stated that he (Dr. Holley) had generally met the performance requirements for these projects.

b. Comparison of Treatment of Petitioner and Ms. Klein.

Ann Klein was the Chairperson of the LCRG, and in this position, Dr. Holley stated, she, not he, was responsible for the development of the objectives of the Learning Center (Tr. page 369, lines 11-19). Dr. Holley stated, also, that she developed the Learning Center objectives in 1983, which he assessed as being more like "goals" than objectives. On January 20, 1984, in a memorandum to Dr. Chen (Respondent Exhibit 18), Dr. Medlin instructed Dr. Chen to develop the objectives and goals for the Learning Center. Dr. Chen objected, stating that developing the Learning Center was the responsibility of the LCRG, and that he was only supposed to give assistance and aid. Dr. Medlin stated that Dr. Chen worked for him and the others did not and he wanted him to facilitate the development of these objectives. By this action, Dr. Chen was given a project that was the responsibility of another individual, Ann Klein. Dr. Medlin, by his comments, implied that the objectives developed by Ms. Klein were unsatisfactory; yet, there is no indication that her performance rating was adversely affected in any manner. Instead, the assignment was given to Dr. Chen. Dr. Holley, who preceded Dr. Chen in this assignment, was not required to perform this task.

c. Comparison of Treatment of Petitioner and Dr. Groves.

Dr. Chen was assigned the task of developing a chapter of the 1983 Training Evaluation Report. The "model" chapter after which his chapter was required to be patterned was to have been furnished to him and others by Dr. Curtis Groves. The Performance Appraisal of Dr. Groves, (Respondent Exhibit 3), identifies August 15, 1983, as the time standard for the submission of his first draft chapter of the Evaluation Report, and identifies September 15, 1983, as the time standard for the submission of the final draft. Dr. Chen stated that he did not receive the "model" chapter until late October or November, he could not remember the date. Dr. Medlin stated that the model was distributed in November 1983 as nearly as he

could remember. The only written evidence as to when the draft model chapter was received by Dr. Chen is recorded in Dr. Chen's log (Respondent Exhibit 2) as being the date of November 24, 1983. The submission by Dr. Curtis Groves was a draft as shown as Petitioner Exhibit 18. Dr. Groves, who was a GS-15, testified that the chapter was revised probably twice after that (Tr. page 341, lines 17-22; page 342, lines 1-10). In Dr. Chen's Performance Appraisal (Respondent Exhibit 19), the original standard for the submission of the final report of Dr. Chen's chapter was November 1, 1983. Dr. Chen did not receive the model chapter until approximately November 24, 1983. Dr. Chen submitted his first draft on December 14, 1983, approximately three weeks after he received the model chapter, and submitted his final draft on January 27, 1984, approximately two months after the model chapter was received.

Dr. Medlin and Mr. Franklin stated that Dr. Chen's submissions were poorly drafted and required complete rewrites or major revisions. The Performance Standard for this project, however, implies that the developer would experience difficulty and, therefore, allows two major revisions and two minor editorial rewrites. The second revision by Dr. Chen was accepted. Dr. Medlin stated that the draft needed some additional work, but he would do it himself and would not send it back to Dr. Chen for additional work. That decision was his choice. The Performance Standards allowed Dr. Chen the opportunity for a third and a fourth revision before the product was rated as "generally not having met the standards." This opportunity was not afforded him. Dr. Medlin, by accepting the second revision and not requiring a third or a fourth, implied that the second revision was an acceptable product.

On the other hand, Dr. Medlin testified at one time (Tr. Page 36) that the second revision was a "major revision." Later, however, (Tr. page 37), he testified that the revision was "something between editorial and major rewrite." In either case, Dr. Chen was not provided an opportunity to accomplish the third and fourth revisions provided in the performance standards. Dr. Medlin's statements in this regard were not as persuasive as his actions. I cannot agree, therefore, with the decision to rate Dr. Chen's performance on this project as unsatisfactory and to cite this performance as a reason for the denial of a within-grade increase and, eventually, the termination of Dr. Chen.

Dr. Chen's suspense dates for the writing and the revising of his draft chapters were more compressed than those of others performing similar tasks--Dr. Groves, for example. Dr. Chen received the model chapter on November 24 and submitted his first draft on December 14, approximately three weeks later; his next suspense date for the second draft was January 4, 1984 (which he met); and the suspense date for the third submission was January 27 (which Dr. Chen met). The total time frame allowed for the development effort was approximately two months.

By contrast, the draft of Dr. Groves' model chapter, according to his performance standards (Respondent Exhibit 3), was due on August 15, 1983, and the final was due on September 15, 1983. The performance appraisal period began on June 8, 1983; therefore, while a project assignment date is not given, it can be concluded that the date was between June 8, 1983, and August 15, 1983. From the testimony given by Dr. Medlin and Dr. Chen, Dr. Groves' draft was not distributed until November 1983--approximately three months after the first draft was due and two months after the final was due. Dr. Groves testified that he produced one or two additional drafts, so the date of the final submission was even later. No ratings are given on Dr. Groves' Performance Appraisal (Respondent Appraisal 3); the only comments are the rater narratives, one of which states that "curriculum evaluations will be done later in fiscal year." Another rater narrative states that "Curtis has been here only about two months so he has not had much of an opportunity to do these tasks. He is currently getting up to speed." The Performance Appraisal indicates that he has been working for Dr. Medlin at least since June 1983. In contrast, during approximately the

middle of December 1983, Dr. Chen, who began his employment at about the same time (June 1983) was told by Dr. Medlin that he (Dr. Medlin) was very unhappy with Dr. Chen's progress. No allowance was made, or consideration given, for the short period of his employment. Dr. Chen was denied a within-grade increase and, eventually, was terminated.

An editorial comparison of the chapters of the Training Evaluation Report submitted by various staff members was attempted. The drafts, however, had no dates and did not identify the draft editions being used in the comparative analysis; for example, the first draft, second draft, etc. Rather than compare submissions, therefore, which may not be comparable in several respects, I did not include the comparison in this discussion. There was evidence, however, of some of the same types of deficiencies on the other reports--missing data and analysis, grammar, format, composition style, beginning paragraphs with "Table -", etc.

d. Petitioner's Treatment by Mr. Franklin.

On February 17, 1984, Dr. Chen requested a transfer from OOHD to another Division of GAO. Mr. Arley F. Franklin was Director of OOHD at the time. He stated that he was aware of Dr. Chen's request, but he advised the Director of Human Resources that he (Mr. Franklin) felt that he did not have the latitude and the authority under the Board order to effect the transfer. The PAB, he stated, had ordered him to place Dr. Chen in a specific position. Mr. Franklin stated that he did not discuss the request with the GAO legal staff, and there is no indication that it was discussed with the Office of Personnel (Tr. page 221, lines 1-22). Mr. Franklin stated that other employees have requested to be transferred to other parts of GAO--more than two and less than 50 requests. He testified that in most cases, these requests were honored (Tr. page 221, lines 10-12). The reasons for these requests and transfers were not given (Tr. page 221, lines 1-12). The discussion at that time, however, concerned Dr. Chen, a probationary employee.

Mr. Franklin testified that insofar as he can remember, he had never previously denied a within-grade increase to an employee and had terminated only one employee other than Dr. Chen (Tr. page 220, lines 4-12). When asked whether he ever considered demoting Dr. Chen rather than terminating him, Mr. Franklin stated that he did not consider demoting Dr. Chen because "there was a person performing another job, who had been directed to replace him and there were expectations of performance at that level" (Tr. page 226, lines 4-8). At this time, Dr. Chen was still employed, yet this testimony indicates that the Agency had already selected a replacement for him.

Under ordinary circumstances, the Agency is under no obligation to transfer or demote a probationary employee. It is a well-established principle in a disparate treatment discharge case that an employer "has the right to discharge an employee for good reason, bad reason or no reason absent discrimination." Tims v. Board of Education, 452 F.2d 551, 552, 4 FEP 127, 128 (8th Cir. 1971). In the federal service, this applies particularly to the discharge of a probationary employee such as Dr. Chen. The Agency, therefore, for the bona-fide business purpose of poor performance and without retaliation or discriminatory intent, could refuse the petitioner's request for transfer and discharge him.

However, to support its decision not to honor the transfer request (even though Mr. Franklin stated that similar requests by other employees had been honored), the Agency reasoned that the order of the Personnel Appeals Board required that Dr. Chen be employed in one of the contested positions and for the Agency to transfer him to another position would violate the provisions of the Order (Tr. page 221, lines 18-22; page 222, lines 1-3). I cannot agree with this line of reasoning. Public Law 96-191, February 5, 1980, General Accounting Office Personnel Act of 1980, Sec. 2, states that the "Comptroller General of

the United States...may appoint, pay, assign, and direct such personnel as the Comptroller General determines necessary to discharge the duties and the functions of the General Accounting Office." The authority "to assign" and "to direct" include the authority to transfer and to perform any other personnel management function that is not based upon discriminatory or other prohibited intent. Once an individual becomes an employee of GAO, he is subject to the same personnel procedures as any other employee. The argument for the Agency made by Mr. Franklin (a manager of at least twenty-two years of experience and employed in a responsible Senior Executive Service position) implies that he was not aware of these prerogatives. The argument is not persuasive--especially considering the fact that Mr. Franklin testified that he did not seek advice on this issue from the legal authorities in the Agency.

The same line of reasoning applies to the demotion consideration. The authority not to demote is within the discretion of the Agency, but the reason given by Mr. Franklin for this decision not to demote infers that the intent to terminate the petitioner had been made at some earlier stage of the petitioner's employment and that a replacement for him had already been selected. This reasoning generates an inference of discriminatory retaliation that is not sanctioned in the ruling in Tims v. Board of Education, supra. I cannot, therefore, agree with it.

e. Disparate Treatment of Petitioner by Dr. Medlin.

In his testimony, Dr. Medlin stated that from January 20, 1984, when Dr. Chen was denied a WIG increase, he maintained a diary detailing Dr. Chen's performance. He stated that "the people in Personnel told me I had to keep a diary on what was going on from there on." He also stated that he does not maintain diaries for all employees, but he is maintaining one at present for another employee (Tr. page 43, lines 8-19). The diary or anecdotal record was not discussed with Dr. Chen.

Chapter 1 of the GAO Personnel Appraisal Manual states that anecdotal records or supervisor's notes are legal providing they are not shown to anyone except the subordinate whose performance it describes, and are destroyed after the written appraisal has been completed and placed on file. It states, further, that for the sake of equity, notes should be kept on all persons supervised and notes should be discussed with the person to whom they pertain when each notation is made. Additionally, the discussion of performance appraisals in this chapter suggests three occasions when notes are to be kept by supervisors: (1) when the performance of employees can be observed infrequently or for a short time; (2) when rating period is lengthy; (3) or when there are frequent shifts in job tasks. These reasons were not offered as the dominant purpose for the records kept on Dr. Chen's performance. In his testimony, Dr. Medlin stated that he has kept a diary on two employees only--Dr. Chen and one other. In both cases the diaries are/were maintained in conjunction with alleged unsatisfactory performances (Tr. page 282, lines 6-13).

The purpose for which the diary on Dr. Chen was maintained is not compatible with the criteria specified in Chapter 1 of the GAO Performance Appraisal Manual discussed above. Also, contrary to the Performance Appraisal Manual's suggestion, the diary kept on Dr. Chen was not made known to him. Dr. Medlin testified that he never wrote assignments to Dr. Chen or to any other employee--he did not have the time. After the denial of a WIG increase to Dr. Chen, however and a subsequent discussion with Dr. Chen on January 20, 1984, in which he was told by Dr. Medlin that he would be terminated if his performance did not improve (Respondent Exhibit 18), Dr. Medlin took the time to write a detailed diary denoting all aspects of Dr. Chen's assignments and performances. The extensive use of this diary, at a time when he was not willing to provide Dr. Chen with written assignments, strongly suggests the possibility of a search for a pretextual basis for a disciplinary action.

f. Assignment of Dr. Chen Under Supervisors Who Testified For Agency in Dr. Chen's Prior Case.

Dr. Medlin and Mr. Franklin testified against Dr. Chen in his initial case. Dr. Chen alleged that placing him under the direct supervision of these two individuals was an act of retaliation that contributed to the termination of his employment. Mr. Franklin stated that in the initial complaint he did testify that Dr. Chen did not have sufficient command of the English language to perform the tasks associated with the position (Tr. page 215, lines 1-22). Dr. Medlin, an immediate subordinate of Mr. Franklin, also testified in the initial case in support of the Agency's case. Mr. Franklin stated, however, that he assigned Dr. Chen to Dr. Medlin's Branch because "Dr. Medlin's had an opening in the series in which the Board directed Dr. Chen be assigned and had no prior association with the previous case" (Tr. page 218, lines 1-8). He stated, in essence, that there were other positions open in the OOHD but they were under the supervision of an individual (Dr. Cowie) who was involved in the initial controversy over Dr. Chen's appointment. Also, Mr. Franklin testified that assigning Dr. Chen to Dr. Medlin's Branch was "a way of being sure that that was not a tainted appointment." To have assigned him to Dr. Cowie's Branch, he suggested, would not have been in his best interest (Tr. page 228, lines 18-22). The statement by Mr. Franklin that Dr. Medlin had no prior association with the previous case is questionable, especially considering the fact that he testified for the Agency in the original case. In his testimony concerning this allegation, however, Dr. Chen did not present any evidence as to other organizational elements to which he could have been assigned at the time of his appointment. Considering the fact that no alternatives were suggested by the Petitioner, I find the reasons given by Mr. Franklin as to why he assigned Dr. Chen to Dr. Medlin's Branch to be reasonable. If other choices had been articulated, then there may have been cause to question the motives at that time. Dr. Medlin testified, however, that OOHD was the only organizational element within GAO that staffed personnel of the job series for which Dr. Chen was denied appointment. Within OOHD, two Branches had vacancies in these particular job series. Mr. Franklin assigned Dr. Chen to Dr. Medlin's Branch because the alternative was to assign him to Dr. Cowie's Branch. In the initial case, Dr. Cowie testified that the communication skills of Dr. Chen would prevent him from performing job requirements at an acceptable level of competence. Assigning Dr. Chen to Dr. Cowie's Branch, therefore, would have been the less desirable of the two available choices.

g. Proper Direction and Assistance for Assigned Tasks.

Dr. Chen alleged that throughout the course of his employment, his supervisors did not give him proper direction and assistance in the accomplishment of assigned tasks. In response to this allegation, Dr. Medlin testified that he engaged in many counseling sessions with Dr. Chen. One week, he stated, he spent close to twenty (20) hours with Dr. Chen. "We sat down," he stated, "and I wrote down on a piece of paper everything imaginable that I would want: 'John, this is what you've got to do, this is what we need.' We took this form on the back and made comments on it, redesigned the form--went through the whole thing--and I never got anything back." (Tr. page 69, lines 7-17). A copy of these notations were not submitted for the record. Except for Respondent Exhibit 5, there is absolutely no written documentation to identify the type, nature, specificity, etc., of assignments given to the Petitioner. Just what specific instructions were given to Dr. Chen, therefore, could not be determined and assessed to any degree of accuracy--especially in regards to an original assignment.

During a discussion session of January 20, 1984, Dr. Medlin stated that he gave Dr. Chen verbal instructions on the Learning Center Evaluation Plan Outline. Dr. Chen responded that he had not understood much of what Dr. Medlin had said. He asked Dr. Medlin why he did not give him his assignments in writing. Dr. Medlin responded that he does not give memos to other staff members, he

simply talks to them (Tr. page 285, lines 16-22). He stated that maybe it would have been a good idea to give Dr. Chen his assignments in writing. There is, however, no indication that he ever changed his procedures.

At the same time that Dr. Chen was requesting written instructions and Dr. Medlin was refusing to give them, Dr. Medlin was also telling Dr. Chen that "if he could do the work, great, but if not, he would have to be released during his probationary period." (Respondent Exhibit 18, Dr. Medlin's diary).

Dr. Medlin testified that he had little experience with Learning Centers, so he instructed Dr. Chen to talk with Dr. Minnick. Additionally, Dr. Medlin gave Dr. Chen some publications by Dr. Minnick to be used as guides in the development of the Learning Center Evaluation Plan. However, Dr. Minnick testified that he had no "experience per se in the design or the management" of Learning Centers; that he had read some literature around the various methodologies, but that he had no involvement in that aspect of training (Tr. page 85, lines 19-22; page 86, lines 1-2). During cross examination, Dr. Medlin stated that the models given to Dr. Chen by Dr. Medlin could not be used as a guide for plan content for the evaluation of an educational Learning Center (Tr. page 312, lines 5-22; page 313, lines 1-2).

The Agency's articulated, nondiscriminatory reason for its actions against Dr. Chen is that he failed to perform his assignments satisfactorily. However, Dr. Chen has established that he was not given clear guidance and instructions and that his assignment criteria frequently changed or were poorly defined. Thus, while the petitioner has the responsibility to perform assigned tasks at an acceptable level of competence, it has been established in this case that his supervisor failed in his responsibility to make petitioner aware of what constitutes satisfactory performance.

While Dr. Medlin's refusal to respond positively to Dr. Chen's request for written assignments and instruction is in consonance with the manner in which instructions are given to other staff members, I cannot agree with his testimony that writing instructions is too time-consuming. The refusal acquires added significance when reviewed in terms of the fact that Dr. Medlin was now spending considerable time writing notes for himself regarding Dr. Chen and that Dr. Chen was working under the fear or threat of being released during the probationary period. Additionally, the guides prepared by Dr. Minnick did not, by Dr. Medlin's own admission, provide Dr. Chen with the assistance Dr. Medlin purported they would. Dr. Medlin, as depicted in Respondent's Exhibit 10, 11, 12, and 13, wrote instructions directly on the draft submissions of projects. Many of these statements, however, do not describe the errors and do not suggest specific ways of correction. For example, how does an employee respond to statements such as the following: "This makes no sense." (With no explanation as to why); "This is not right." (With no specific discussion as to what is wrong); "Not an appropriate opening paragraph." (Without a specific suggestion as to what is.) The employee needs to be aware of the acceptable standard he is required to attain. I am not convinced that these procedures for giving instructions and assignments satisfied this requirement. The evidence, especially in these two instances, indicates that the Agency did not clearly articulate to the petitioner the specific guidance necessary to determine just what, specifically, was expected of him in terms of a finished product. Dr. Medlin stated that he had no experience in the development of Learning Centers. Also, the documents which were given to Dr. Chen for guides could not be used for the purpose identified by Dr. Medlin. The document in question (the Learning Center Evaluation Plan) was the major task assigned to Dr. Chen, and I am not convinced that the guides and instructions given him by the Agency were adequate for him to perform the assignment any differently than was done.

DECISION

Dr. Chen established a prima facie case of retaliatory discrimination. See pages 4-5 above for a discussion of the elements of this prima facie case. The agency articulated legitimate, non-discriminatory reasons for its actions. In the case of Bibbs v. Black, 749 F.2d 508, (8th Cir. 1984), the court stated that a plaintiff must prove his claim of unlawful discrimination by showing that a "discriminatory reason more likely (than not) motivated the employer." Petitioner has done this. He has shown by a preponderance of the evidence that the agency's articulated reasons are a pretext for discrimination. In Williams v. Boorstin, 663 F.2d 109 at 117 (D.C. Cir. 1980), the Court of Appeals ruled that after the Petitioner has made a showing of pretext, the employer must demonstrate by clear and convincing evidence that the Petitioner would have lost his job anyway absent evidence of retaliation for the employee's participation in protected conduct. "The mere presence of a legitimate purpose underlying the discharge," the court said, "will not sterilize unlawful retaliation when the latter is in fact the dispositive cause." See also, Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976) for a discussion of this "but for" test. Considering the evidence presented in this case, both actual and circumstantial, I am persuaded that Petitioner has proven the reasons articulated by management to be pretextual and I am not persuaded that the Agency has demonstrated clearly and convincingly that the Petitioner would have been terminated anyway absent a retaliatory motive. The evidence presented by the Agency does not substantially support its allegations of poor performance against the Petitioner; but even if this evidence were substantial to the degree necessary to support the poor performance charges, the preponderance of the evidence, including but not limited to the following examples, also provides reasonable basis to support inferences of retaliatory motives.

1. Historically, the Agency (Mr. Franklin) has granted transfers requested by other employees, but denied the Petitioner's request on the reason that to transfer him would violate the order of the Personnel Appeals Board to place him in one of the vacancies for which he had been found qualified. That argument is not persuasive. Once an individual becomes an employee of the Agency, he is to be treated the same as any other employee, and it is difficult to imagine that a supervisor at the level of Mr. Franklin would be unaware of that fact.
2. The supervisor stated that he did not consider a downgrading action for the Petitioner because another individual had already been selected for the position. This statement infers that the decision to fill the position occupied by the Petitioner had been completed before he had been notified of termination action--an indication that a discriminatory reason more likely than not motivated the employer.
3. A diary was maintained on Dr. Chen detailing his performance. The procedures employed in the maintenance of the diary violated the provisions and pertinent requirements of Chapter I of the GAO Personnel Appraisal Manual in that Dr. Chen was not informed of the fact that the diary was being maintained; a diary was not being kept on all other employees; the provisions as to the conditions under which a diary should be kept were not applicable to Dr. Chen's situation, that is, when employees can be observed only infrequently, the rating period is lengthy, or there are frequent shifts in job tasks. There is no evidence that these reasons constituted the purpose for which the diary was kept on Dr. Chen. The keeping of the diary, therefore, strongly suggests the possibility of a search for a pretextual basis for disciplinary action which, in turn, infers that the subsequent disciplinary action of denial of a within-grade increase and, later, termination more likely than not was based upon a retaliatory motive.

4. The guidance and assistance given to Dr. Chen in the performance of two of the tasks which formed the basis for the Agency's allegation of poor performance was inappropriate. Dr. Chen was denied a within-grade increase partly because a literature search he submitted did not contain a management summary. The requirement for a management summary was clearly not requested in the written assignment given to Dr. Chen. Additionally, the evidence shows that a management summary as a requirement was not discussed with Dr. Chen until his supervisor discussed with him the denial of a within-grade increase, approximately three months after Dr. Chen had submitted the project. Also, Dr. Chen was assigned the task of developing a plan for evaluating a Learning Center. His supervisor, Dr. Medlin, instructed him to obtain guidance from Dr. Minnick to be used in the development effort. Dr. Minnick testified that he (Dr. Minnick) had no experience or training in either the design or the management of learning centers. He had read some literature, he stated, but learning centers were not in his area of expertise. Under cross-examination, Dr. Medlin testified that he had no experience in education learning centers and that the documents of Dr. Minnick that he had given to Dr. Chen were not appropriate for content guidelines in the preparation of a learning center. Without proper guidance, an employee cannot be expected to determine what is considered to be an acceptable level of performance. This guidance was not provided Dr. Chen.

5. The standards of performance and the performance reviews applied to Dr. Chen were more stringent than those applied to other employees performing similar tasks. Dr. Curtis Groves, for example, who was at a higher grade level than Dr. Chen, was to have presented a "model" chapter to Dr. Chen in September; Dr. Chen received the model in November, three to four months after it was assigned to Dr. Groves. Dr. Groves, by his testimony completed at least two additional drafts--which extended his completion time frame. Dr. Chen, by comparison, completed a similar assignment between the period of November 24, 1983, and January 27, 1984, a period of approximately two months. The January 27 draft was accepted after the second revision, when four revisions were allowed by the standards. Thus, Dr. Chen finished a project similar to that of Dr. Groves in one-half the time and required fewer drafts. Although Dr. Groves was at a higher grade level than Dr. Chen, allowances were made for the deficiencies of Dr. Groves (the performance standard for Dr. Groves stated that he had only been on board for approximately two months (an error), but Dr. Chen was denied a within-grade increase and given a poor performance rating. Dr. Holley, who had the Learning Center assignment before Dr. Chen, by his testimony, worked for four months exclusively on one phase of the Learning Center Evaluation Plan--the Questionnaire. He stated that the responsibility for developing the objectives for the Learning Center was assigned to Ann Klein and not to him. Dr. Chen, on the other hand, was required to do much more than Dr. Holley, who was also at a higher grade level than Dr. Chen. Dr. Chen was required to develop the objectives, revise the questionnaire, develop the Learning Center Evaluation Plan, perform the Literature Search, and write the Special Courses and Issue Area Courses for the Training Evaluation Report for 1983. Dr. Holley's performance appraisal indicates that he completed his assignments, including the development of a plan to evaluate the learning center. Approximately two the Learning Center Evaluation Plan was assigned to Dr. Chen--an indication that it was not completed by Dr. Holley. The compressed project-completion time frames, the poor performance rating, the lack of adequate guidance, and the assignment of responsibilities to Dr. Chen that were previously the responsibilities of others infer that a discriminatory reason more likely than not motivated the actions of the Agency.

The evidence indicates that more likely than not, a discriminatory reason of retaliation motivated the actions of the Agency in the denial of a within-grade increase to Dr. Chen and the eventual termination of his employment; and, but for this reason, the Petitioner would not have been denied a salary increase and his employment with the Agency would not have been terminated. My decision, therefore, is for the

Petitioner, and he is to be made whole in all respects.

Furthermore, it appears that it may not be prudent to place Dr. Chen in OOHD if there is any way that can be avoided. It is apparent that his skills and training in education and library sciences qualify him for many more positions than the one he most recently occupied with the agency. Therefore, it is urged that the agency work closely with Dr. Chen and his counsel in an effort to find a position outside OOHD that would meet the needs of the agency as well as be appropriate to Dr. Chen's experience.